



October 14, 2002

Mr. Gary Grief  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR2002-5827

Dear Mr. Grief:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170597.

The Texas Lottery Commission (the "commission") received a request for

1. Everything in [the requestor's] personnel file.
2. "All" correspondence regarding [the requestor's] employment from companies requesting information regarding [the requestor's] employment with the [commission] since [the requestor's] separation in June, 2002 to date.
3. "All" Minority Development Status Reports (from 1995 to 2001).
4. "All" African-American [sic] salaries and positions from 1998 to 2000 (by individuals).
5. "All" Hispanics [sic] salaries and positions from 1998 to 2000 (by individuals).
6. "All" Anglos [sic] salaries and positions from 1998 to 2000 (by individuals).

You claim that requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

The requestor also asks that the commission provide her with her personal belongings and paperwork, including e-mail messages and memos between the requestor and her managers, executive staff and other commission personnel.<sup>1</sup> You did not submit any information responsive to the request for the requestor's paperwork. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302. Because you have not submitted this information, we have no basis for finding it confidential. *See* Gov't Code § 552.352. Thus, we have no choice but to order any such information released, to the extent it exists, per section 552.302 of the Government Code. If you believe any such information is confidential and may not lawfully be released, you must challenge this decision in court as outlined below.

Next, we note that some of the submitted documents consist of medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient

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<sup>1</sup>We note that this office has ruled that tangible physical items are not the type of information contemplated under the Public Information Act (the "Act"). *See, e.g.,* Open Records Decision No. 581 (1990).

communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the documents in Exhibit B that consist of medical records and are therefore subject to the MPA. This information may be released only in accordance with the MPA.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 makes certain information expressly public, unless it is confidential under other law. Section 552.022 makes “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” public information unless expressly made confidential under other law or “except as provided by [s]ection 552.108[.]” Gov’t Code § 552.022(a)(1). Another category of expressly public information under section 552.022 is “the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]” Gov’t Code § 552.022(a)(2). Thus, the lists of employee names, ethnicity, title, and salary submitted as Exhibits C, D, and E, and the completed evaluations submitted in Exhibit B, which we have marked, are subject to section 552.022. Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not “other law” that makes information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential). Therefore, the commission may not withhold Exhibits C, D, and E, or the information in Exhibit B that we have marked as being subject to section 552.022, from disclosure under section 552.103 of the Government Code. As you do not raise any other exceptions to the disclosure of this information, it must be released to the requestor.

We will address your argument under section 552.103 with respect to the remaining submitted information. Section 552.103 provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

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(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the commission must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, that the commission is currently a defendant in a pending lawsuit, which was filed by the requestor on October 24, 2001. Our review of the submitted petition indicates that this lawsuit involves an employee's claims of discrimination, harassment, and retaliation, which the employee alleges resulted in denial of equal pay, training opportunities, and promotions. Based on your representations and our review of the information at issue, we conclude that the information at issue relates to litigation that was pending on the date the request was received. Therefore, the commission may withhold the remaining information under section 552.103, with the following exception.

We note that the requestor, who is the opposing party in the pending litigation, has had access to much of the information in her personnel file. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information in the requestor's personnel file that has either been obtained from or provided to the requestor — the opposing party in the pending litigation — is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis.<sup>2</sup> We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>2</sup>We note that some of these documents contain confidential information that is not subject to release to the general public. *See* Gov't Code § 552.023. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the commission receives a further request for this information from an individual other than the requestor or her authorized representative, the commission should again seek our decision.

To summarize: (1) we have marked the information in Exhibit B that may only be released in accordance with the MPA; (2) Exhibits C, D, and E, and the information we have marked in Exhibit B, are subject to section 552.022 of the Government Code and must be released; and (3) with the exception of the information in the requestor's personnel file that has either been obtained from or provided to the requestor, the remaining information may be withheld under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen A. Eckerle". The signature is fluid and cursive, with the first name "Karen" being more prominent than the last name "Eckerle".

Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 170597

Enc: Submitted documents

c: Ms. Loretta Hawkins  
14703 Varrelman  
Austin, Texas 78725  
(w/o enclosures)